Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE EL PASO COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

TIMOTHY J. MCCORMALLY
Tax Executives Institute, Inc.
1300 North 17th Street, Suite 1300
Arlington, Virginia 22209
(703) 522-3535
Counsel for Amicus Curiae
Tax Executives Institute, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of the Amicus Curiae	1
Reasons for Granting the Writ of Certiorari	3
Conclusion	14

TABLE OF AUTHORITIES

CASES: Page

Couch v. United States, 409 U.S. 322 (1973) 5
Foster v. United States, 265 F.2d 183 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959) 7, 8
Hickman v. Taylor, 329 U.S. 495 (1947) 10
P.T. & L. Construction Co. v. Commissioner, 63 T.C. 404 (1973) 10
United States v. Arthur Young & Co., 677 F.2d 211 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3341 (U.S. Oct. 20, 1982) (No. 82-687) ..... *passim*
United States v. Bisceglia, 420 U.S. 141 (1975) 4, 8, 9
United States v. Coopers & Lybrand, 550 F.2d 615 (10th Cir. 1977), *aff'g* 413 F. Supp. 942 (D. Colo. 1975) ..... *passim*
United States v. Euge, 444 U.S. 707 (1980) 11
United States v. Harrington, 388 F.2d 520 (2d Cir. 1968) 8, 10
United States v. Matras, 487 F.2d 1271 (8th Cir. 1973) 5, 8, 9, 10
United States v. Powell, 379 U.S. 48 (1964) 3, 4, 10, 12
United States v. Theodore, 479 F.2d 749 (4th Cir. 1973) 8
Upjohn Co. v. United States, 449 U.S. 383 (1981) 6, 7, 11

STATUTES, ACTS OF CONGRESS, AND RULES:

Internal Revenue Code of 1954, as amended (26 U.S.C.)
§ 6661 ..... 12, 13, 14
§ 7602 ..... *passim*
§ 7604 ..... 4, 5, 9, 10
15 U.S.C. § 78b (1976) 5
15 U.S.C. § 78*l* (1976) 4
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, § 323(a) (codified at Internal Revenue Code of 1954, as amended [26 U.S.C.], § 6661) 12
Regulation S-X, 17 C.F.R. §§ 210, *et seq.* (1981) 4
I Internal Revenue Manual—Audit (CCH) § 4024 (1981) 12

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

Internal Revenue Service Information Release, IR-81-49, Remarks by Roscoe L. Egger, Jr., Commissioner of Internal Revenue, Before the Joint Meeting of the San Francisco Chapter of the California CPA Society and the Tax Section, San Francisco Bar Association, San Francisco, California, May 5, 1981 ..... 11, 12

Tax Executives Institute, Inc., *Thirty Years for the Profession* (1974) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-716

THE EL PASO COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* to urge this Court to grant The El Paso Company's petition for a writ of certiorari in this case.[1]

---

[1] Tax Executives Institute has requested and received the written consent of all parties to the filing of this brief, which consents are filed herewith.

Amicus Tax Executives Institute, Inc. (TEI) is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 3700 members from more than 1100 of the leading corporations in the United States and Canada. TEI is dedicated to promoting the uniform and equitable enforcement of tax laws throughout the nation and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers. Among the standards of professional conduct that all TEI members subscribe to is the following, which bears directly on the central issue raised by the decision of the court below:

> The member will present the facts required in tax returns and all the facts pertinent to the resolution of questions at issue with representatives of the government imposing the tax.

TEI Standards of Conduct, *reprinted in* Tax Executives Institute, Inc., *Thirty Years for the Profession* 25 (1974).

TEI members have a vital interest in the resolution of the "tax accrual workpapers" issue addressed by the court below. Substantially all TEI members are employed by corporations that are subject to federal securities laws, compliance with which requires the preparation of tax accrual workpapers or similar documents. Consequently, TEI members almost without exception are involved in the preparation or review of tax accrual workpapers. TEI is understandably concerned about the Internal Revenue Service's attempts to obtain such workpapers, which are nonfactual in nature and consist of theories, hypotheses, opinions, and speculations regarding contingent tax liabilities. In particular, TEI believes that, unless reversed by this Court, the decision below would not only erode the protections afforded taxpayers by section

7604 of the Internal Revenue Code of 1954, as amended,[2] and elaborated on by this Court in *United States v. Powell*, 379 U.S. 48 (1964), but would also undermine certain policies underlying the federal securities law (specifically, the maintenance of fair and honest securities markets).

Amicus Tax Executives Institute, as the principal association of corporate tax executives and managers, believes prompt review by this Court of the decision below is necessary to achieve a proper balance of the competing policy interests and to provide taxpayers and the Internal Revenue Service alike with guidance on the scope of the Service's summons power under section 7602. TEI accordingly supports The El Paso Company's petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

Nearly two decades ago this Court was called upon to articulate the requirements for enforcement of a summons issued under section 7602 of the Code. In *United States v. Powell*, 379 U.S. 48 (1964), the Court forthrightly answered that call and held that in order for such a summons to be enforced—

> [The Internal Revenue Service] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed * * *.

Id. at 57-58. In addition, the Court in *Powell* made it clear that section 7602 is not self-executing and that the federal courts have an important role to play in en-

---

[2] Unless otherwise noted, all references to sections are to the Internal Revenue Code of 1954, as amended (I.R.C.), which is codified at title 26 of the United States Code.

suring that the Service exercises its summons authority in good faith. *Id.* at 58. *See also United States v. Bisceglia*, 420 U.S. 141, 151 (1975) (the Internal Revenue Service's summons power "is a limited power and should be kept within its proper bounds").[3]

This Court granted certiorari in *Powell* "[b]ecause of the differing views in the circuits on the standards the Internal Revenue Service must meet to obtain judicial enforcement of its orders * * *." 379 U.S. at 50-51 (footnote omitted). Unfortunately, with respect to tax accrual workpapers and similar documents,[4] the uncertainty the Court sought to dispel in *Powell* remains. The courts of appeals are badly divided on this issue, both on the result that should obtain when a summons is issued for such nonfactual information and on the rationale that should be used in determining whether to enforce such a summons. Specifically, the Tenth Circuit in *United States v. Coopers & Lybrand*, 550 F.2d 615 (10th

---

[3] In *Bisceglia* this Court explained that the purpose of section 7604 is to provide "protection from arbitrary and capricious action by placing the federal courts between the Government and the person summoned." *Id.*

[4] Tax accrual workpapers, which are also variously referred to as "tax pool analysis," "tax accrual files," "tax cushion," and "tax liability contingency analysis," comprise a company's theories, opinions, arguments, and speculations about its contingent tax liabilities. The workpapers are not prepared in connection with the preparation of the company's tax returns. Rather, they are prepared, either by the company's own tax personnel or by independent outside accountants, to assist the company in satisfying its legal responsibilities under federal securities laws. Specifically, the tax accrual workpapers are used by the company's accountants in preparing audited financial statements in accordance with generally accepted accounting principles; those principles require, among other things, that provision be made for material contingent liabilities (ranging from the probable to the highly remote), including tax liabilities that might be reasonably incurred in negotiating settlements of proposed audit adjustments so that extended litigation can be avoided. *See* 15 U.S.C. § 78*l* (1976); Regulation S-X, 17 C.F.R. §§ 210, *et seq.* (1981).

Cir. 1977), held that a summons seeking access to tax accrual workpapers is not enforceable under section 7604 because such documents are not relevant to the taxpayer's tax liability. The Eighth Circuit in *United States v. Matras*, 487 F.2d 1271 (8th Cir. 1973), reached the same result in respect of quite analogous documents. Taking a different approach, the Second Circuit in *United States v. Arthur Young & Co.*, 677 F.2d 211 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3341 (U.S. Oct. 20, 1982) (No. 82-687), recently concluded that tax accrual workpapers are relevant under section 7602; the court found, however, that public policy required that a summons for such documents ordinarily not be enforced, and accordingly it fashioned a work-product privilege that, in the absence of allegations of fraud, will shield the documents from disclosure. The court below, of course, held both that Petitioner's tax accrual workpapers were relevant to the Service's audit and that the work-product privilege had no application to such documents; moreover, the court below held that any attorney-client privilege that might have existed with respect to tax accrual workpapers prepared under the supervision of an attorney was waived when the workpapers were disclosed to Petitioner's accountants.

Clearly, a conflict exists over whether and why the Internal Revenue Service should be denied access to tax accrual workpapers. The conflict is attributable to the differing views the courts of appeals have respecting the government's interest "in the enforcement of its laws and collection of the revenues," *Couch v. United States*, 409 U.S. 322, 336 (1973), and the "national public interest • • • [in] insur[ing] the maintenance of fair and honest markets in [securities] transactions," 15 U.S.C. § 78b (1976). *See United States v. Arthur Young & Co.*, 677 F.2d at 219. Guidance from this Court is needed to resolve how these policy interests are to be weighed. Accordingly, the writ of certiorari should be granted pursuant to Rule 17.1(a) of the Rules of this Court.

It is respectfully submitted, moreover, that in resolving the conflict among the courts of appeals, this Court should articulate guidelines that can be applied regardless of the factual setting in which the tax accrual workpapers issue arises. The policy question that this case poses is whether nonfactual documents prepared to ensure compliance with the securities law and not in connection with preparation of tax returns should, absent allegations of fraud, be subject to a summons issued under section 7602 of the Code. *Amicus* Tax Executives Institute submits that the proper answer to that question is no, and consequently that the decision of the court below should be reversed.

Whatever balance is struck in this case, it is essential that a uniform rule be established. Obviously, the resolution of this issue should not depend on which circuit a suit to enforce a summons is brought in. Nor should the result turn on whether the tax accrual workpapers are prepared by or are in the possession of independent outside accountants rather than the company's own personnel or on their being prepared by or under the supervision of a lawyer. The need for nondisclosure—to ensure both the independence of the auditing process and the high quality of financial reporting—is compelling regardless of who prepares or possesses the workpapers. Consequently, this Court should generally hold that, in the absence of allegations of fraud, tax accrual workpapers are not subject to disclosure under section 7602 of the Code.[6]

---

[6] Because a majority of its members are not lawyers or employed by companies whose tax departments are headed by lawyers, *amicus* TEI is concerned that reversal of the court below on the attorney-client privilege issue alone, while certainly proper in light of this Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), would not provide the necessary guidance to the majority of corporate taxpayers, which rely on accountants to prepare or supervise the preparation of tax accrual workpapers. Similarly, a simple affirmance of the Second Circuit's decision in *Arthur Young*, with-

II.

The court below held that Petitioner's tax accrual workpapers were relevant to the Internal Revenue Service's audit. That holding is directly at odds with the Tenth Circuit's holding in *Coopers & Lybrand* and with the reasoning of the Eighth Circuit in *Matras*. In reaching their contrary results, the courts of appeals applied different standards of relevance, and guidance from this Court is necessary to resolve the conflict.

In finding tax accrual workpapers to be relevant under section 7602, the court below applied the test for relevance first articulated by the Second Circuit in *Foster v. United States*, 265 F.2d 183 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959), namely, that a summons satisfies the relevance test if it seeks information that "might throw light upon the correctness of the taxpayer's returns." 265 F.2d at 187; *United States v. El Paso Co.*, 682 F.2d 530, 537 (5th Cir. 1982); *accord United States v. Arthur Young & Co.*, 677 F.2d at 218. Although acknowledging that tax accrual workpapers are not prepared to assist in filling out tax returns but rather only for financial reporting purposes, 682 F.2d at 534-35, the court below concluded that the documents are relevant because they tend to "focus and concentrate the Service's energy on questionable positions in the return * * *." 682 F.2d

---

out making it clear that the work-product privilege fashioned by the court applies with the same force to tax accrual workpapers prepared and maintained by a taxpayer's own personnel as it does to workpapers prepared and maintained by outside accountants, would do little to end the confusion and uncertainty that marks this area. TEI recognizes that this Court "sit[s] to decide concrete cases and not abstract propositions of law * * *." *Upjohn Co. v. United States*, 449 U.S. at 386. Consistent with the view that the Court has a "special duty" to provide guidance, *id.* at 403 (Burger, C.J., concurring), however, TEI respectfully suggests that the tax accrual workpapers issue be addressed in such a way that all taxpayers who, to ensure compliance with the securities laws, prepare or make use of such workpapers, as well as the government, know the limits of the Internal Revenue Service's summons power.

at 537. *Amicus* Tax Executives Institute respectfully submits that the standard of relevance applied by the court below is unreasonably broad.

This Court, of course, has never directly addressed the propriety under section 7602 of the "might throw light" standard of relevance. Several circuits, however, have expressed reservations about that standard and especially about the dangers of adopting too broad an interpretation of the term. For example, the Second Circuit in *United States v. Harrington*, 388 F.2d 520 (2d Cir. 1968), held that even under *Foster* (which that court decided) a summons will not be enforced unless there is "an indication of a realistic expectation rather than an idle hope that something may be discovered." *Id.* at 524; *accord United States v. Bisceglia*, *supra*, 420 U.S. at 151 (section 7602 does not authorize a "fishing expedition" by the Service); *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir. 1973) (same). A similar concern was voiced by the Eighth Circuit in *United States v. Matras*, *supra*, where the Service issued a summons for the taxpayer's proposed budgets—"only a projection of what the actual transactions would be," 487 F.2d at 1272—on the ground that they would be useful as a "road map as to where we want to go." *Id.* at 1273. The Eighth Circuit refused to enforce the summons. In doing so, the court first explained that "[t]he term 'relevant' connotes and encompasses more than 'convenience.'" *Id.* at 1275. Then, it added:

> Consequently, we are not persuaded to fault the district judge for concluding that the government failed to sustain its burden of proof by alleging a general need for a "road map." If we were to accede to the government's view, it is difficult to imagine corporate materials that might not contribute to a more comprehensive understanding of the workings of the corporation, and thus, according to the government, be deemed relevant to the tax investigation.

Id.

The policy reasons for not adopting the Service's proposed definition of relevance were further elaborated on by both the district court and the Tenth Circuit in *United States v. Coopers & Lybrand*, *supra*, which specifically involved tax accrual workpapers. In that case, the Tenth Circuit cited *Matras* with approval and then agreed with the trial court that tax accrual workpapers, like the proposed budgets in *Matras*, are not relevant for section 7602 purposes. The court of appeals reasoned, as follows:

> [E]xtending IRS contentions herein to their logical conclusion, it is hard to determine what corporate records would not fall under a § 7602 summonses [*sic*] if the standard endorsed the production of *any* records which *might* show tax fraud or tax liability. IRS does not, as it appears to assume on this appeal, have *carte blanche* discovery.

550 F.2d at 619 (emphasis in original), *aff'g* 413 F. Supp. 942, 946-49 (D. Colo. 1975) (several factors must be weighed in deciding whether tax accrual workpapers are relevant, including the adverse effect disclosure might have on the interchange between the taxpayer and its independent accountants and any resulting weakening of the securities laws).

The Eighth Circuit in *Matras* and the Tenth Circuit in *Coopers & Lybrand* properly concluded that application of too open-ended a definition of "relevance" would constitute an abdication of the courts' supervisory responsibility under section 7604. The court below obviously reached the contrary conclusion. This Court should grant certiorari to consider whether the decision of the court below effectively eviscerates the protections afforded by section 7604 and, consequently, whether the Tenth and Eighth Circuits' decisions to keep the Service's summons power "within its proper bounds" (*United States v. Bisceglia*, *supra*, 420 U.S. at 151) were appropriate.

Amicus Tax Executives Institute respectfully urges this Court to hold that the "realistic expectation rather than an idle hope" standard of *Harrington* is an integral part of section 7602 and, moreover, that absent allegations of fraud, nonfactual materials (such as tax accrual workpapers) are not relevant and thus not subject to the Service's summons power.[6] Limiting the definition of relevance to factual materials (except perhaps in those cases involving allegations of fraud where the taxpayer's state of mind would be at issue) would not only be eminently sensible but would give fresh significance to the protections afforded by section 7604.[7]

III.

The court below found that no work-product privilege shielded Petitioner's tax accrual workpapers from disclosure. That conclusion conflicts with the Second Circuit's decision in *Arthur Young*, where the court held that the policies underlying federal securities laws required that a work-product privilege be fashioned to preserve "the integrity of the auditing process." 677 F.2d at 221, *citing Hickman v. Taylor*, 329 U.S. 495, 512-13 (1947). Thus, although concluding that tax accrual workpapers were relevant under its expansive reading of section 7602, the Second Circuit ultimately struck the same balance between the competing interests as the

---

[6] *Cf. P.T. & L. Construction Co. v. Commissioner*, 63 T.C. 404, 414 (1973), in which the Tax Court explained: "What is relevant [under the Tax Court's discovery rules] is the *factual information* which may either reveal evidence that will be admissible at the trial or lead to the discovery of such evidence. Mental impressions, legal analysis, conclusions, and recommendations are generally not relevant." (Emphasis in original.)

[7] In addition to providing guidance on the relevance standard to be applied, the Court might well consider whether a summons for tax accrual workpapers issued at the outset of an audit before any specific issues are identified could ever satisfy the good faith requirement of *Powell*. *See* note 8 *infra*.

Tenth Circuit did in *Coopers & Lybrand*. The *result* reached by the court below, then, conflicts not only with the result in *Coopers & Lybrand* but also with the result in *Arthur Young*. This Court should grant certiorari and reverse the court below, thereby confirming that the strong national interest underlying the securities laws justifies shielding tax accrual workpapers from disclosure under section 7602. *See United States v. Arthur Young & Co.*, 677 F.2d at 219 (summonses are not to be mechanically enforced; countervailing national policy can undercut broad latitude otherwise provided to the Service), *citing United States v. Euge*, 444 U.S. 707, 715-16 & n.9 (1980).

Amicus Tax Executives Institute respectfully submits that the strong public interest in maintaining the high level of financial reporting ordinarily far outweighs the Service's "need"—for convenience' sake—for a "road map." Consequently, to prevent that public interest from being undermined, the Service should, absent allegations of fraud, be denied access to tax accrual workpapers. The court below, of course, concluded almost cursorily that it was "wholly speculative" to state that the compelled disclosure of tax accrual workpapers would undermine the securities laws. 682 F.2d at 544. That conclusion is contrary not only to that reached by the Second Circuit in *Arthur Young*, 677 F.2d at 220 & n.9, *citing Upjohn Co. v. United States*, *supra*, 449 U.S. at 393 n.2, but also to the views of the current Commissioner of Internal Revenue, Roscoe L. Egger, Jr., who has remarked that a Service policy of routinely seeking tax accrual workpapers—a policy the decision of the court below implicitly supports—"had real potential for serious negative effects on the quality of financial reporting." Internal Revenue News Release, IR-81-49, Remarks by Roscoe L. Egger, Jr., Commissioner of Internal Revenue, Before the Joint Meeting of the San Francisco Chapter of the California CPA Society and the Tax Section, San Francisco Bar Association, San Francisco, California,

May 5, 1981.[8] This Court should consider whether the policy considerations that led to its decision in *Upjohn* should similarly lead to the recognition of a work-product privilege in respect of tax accrual workpapers.[9]

IV.

Shortly after the court below rendered its decision in this case, Congress enacted legislation that at a minimum circumscribes and that arguably vitiates entirely the Service's authority to seek tax accrual workpapers under section 7602 of the Code. Section 323(a) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (to be codified at section 6661 of the Code, 26 U.S.C. § 6661), provides a penalty for substantial underpayments of tax. That penalty is to be forgiven, however, to the extent the underpayment is attributable to items with respect to which the relevant facts are adequately disclosed on the taxpayer's return.[10] Thus,

---

[8] Commissioner Egger's remarks were followed shortly by a revision of the Service's rules for requesting tax accrual workpapers. Under the amended rules (which are found in section 4024 of the Internal Revenue Manual), an examiner is not to request tax accrual workpapers until (1) the tax examination is substantially completed, (2) specific issues are identified, and (3) the taxpayer (and his accountant) are requested to provide all known *facts* that relate to the identified issues. I Internal Revenue Manual—Audit (CCH) § 4024 (1981). Given the Service's recognition of the need to preserve the high quality of financial reporting and its own apparent doubts about the propriety of routinely seeking tax accrual workpapers, it would seem appropriate for this Court to address whether, under a proper reading of the good faith requirement of *Powell*, compliance with the revised procedures is required under section 7602.

[9] A decision that tax accrual workpapers are not relevant under section 7602, of course, would obviate the need for this Court to consider the privilege question.

[10] I.R.C. § 6661(b)(2)(B)(ii). The penalty is also forgiven if the taxpayer has "substantial authority" for its position. I.R.C. § 6661(b)(2)(B)(i). Different rules apply in respect of tax shelters. I.R.C. § 6661(b)(2)(C).

Congress has passed legislation that encourages the disclosure of positions for which the taxpayer does not have substantial authority.

There is concededly no statutory link between new section 6661 and the Service's authority to issue summonses under section 7602. It cannot be denied, however, that the new provision is related to the Service's efforts to secure tax accrual workpapers. Indeed, in refusing to enforce the summons in *Arthur Young*, the Second Circuit specifically referred to such a provision (then in its nascent stages), as follows:

> In reaching this conclusion [not to enforce the summons], we are comforted by the knowledge that if Congress feels that this privilege unduly restricts the IRS's authority, it can require that this material be made available, or that taxpayers flag their questionable positions directly on their returns, in line with the suggestions of former Commissioner Kurtz, 32 Tax Law. [13,] at 15-16 [1978]; Cooper, The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform, 80 Colum. L. Rev. 1553, 1612 (1980). Procuring tax accrual workpapers under § 7602 seems to us to effectuate Commissioner Kurtz's proposals through the back door.

677 F.2d at 221.

Almost as if in response to the Second Circuit's invitation, Congress enacted section 6661. That provision affords taxpayers a choice of two means by which the substantial underpayment penalty can be avoided—either by having substantial authority for the positions taken on the return or by disclosing the relevant facts in respect of those positions. If not reversed, however, the decision of the court below could well present taxpayers with nothing more than a Hobson's choice under section 6661, for disclosure would occur in all events—either on the return (pursuant to new section 6661) or during the

audit (in response to a summons). That result, it is submitted, would be fundamentally at odds with Congress's intent in enacting section 6661.

Stated differently, section 6661 carefully prescribes what the taxpayer should disclose (essentially, the relevant facts relating to positions for which there is not substantial authority) and the consequences of not doing so (the underpayment penalty). It defines, quite simply, the type of limited "road map" taxpayers must provide to the Service. To borrow the Second Circuit's analogy, having been told what information it can obtain through the "front door" (the tax return and supporting factual information), the Service should properly now be precluded from obtaining additional information through the "back door" (the summons). This Court should grant certiorari to clarify precisely the extent to which new section 6661 limits the Service's authority under section 7602.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

TIMOTHY J. MCCORMALLY
Tax Executives Institute, Inc.
1300 North 17th Street, Suite 1300
Arlington, Virginia 22209
(703) 522-3535
Counsel for Amicus Curiae
Tax Executives Institute, Inc.

November 22, 1982